

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JACK SMITH**

Claimant

VS.

**WOOD PIT BBQ**

Respondent

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Docket No. 1,011,143

**ORDER**

Claimant appealed the October 31, 2003 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

**ISSUES**

Claimant alleges that he injured his low back while working for respondent each workday through May 15, 2003. In the October 31, 2003 preliminary hearing Order, Judge Frobish denied claimant's request for benefits finding claimant failed to prove that he was injured while working for respondent.

Claimant contends Judge Frobish erred. Accordingly, claimant requests the Board to reverse the October 31, 2003 Order and grant his request for benefits.

Conversely, respondent contends the Order should be affirmed as claimant failed to prove that he injured himself while working for respondent and, also, that he failed to prove that he provided timely notice of the alleged accidental injury.

The only issues before the Board on this appeal are:

1. Does the evidence establish that claimant sustained personal injury by an accident which arose out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accident or injury as required by the Workers Compensation Act?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and after considering the parties' arguments, the Board finds and concludes that the October 31, 2003 preliminary hearing Order should be affirmed.

This claim hinges on claimant's credibility. Claimant contends he injured his back due to the heavy lifting and bending that he did while performing his duties as a kitchen helper for respondent, who prepares and sells smoked meats. Claimant testified that over the course of his employment he told Chip Wood, one of respondent's owners, that he was developing back problems. Claimant testified his back worsened each and every day he worked for respondent through his last day on May 15, 2003, and that he advised respondent's owner approximately every other day that he was injuring his back at work. Later, claimant testified that his back problems began on May 7, 2003.

Mr. Wood, on the other hand, testified that he did not know that claimant was alleging a work-related injury until June 2003, when he received a letter from claimant's attorney. The record is not clear whether Mr. Wood was aware that claimant was experiencing any back problems before speaking with him on May 16, 2003, and learning that claimant was not coming in to work due to his symptoms. On the other hand, Alicia Wood, who is another of respondent's owners, testified that she heard claimant talking about doing landscaping work at his new home and that his back was irritated from doing that work.

Claimant last worked for respondent on May 15, 2003. The next morning claimant saw Dr. Handshy. According to claimant, he told the doctor that he had injured his back at work. But Dr. Handshy's notes, which were introduced at the preliminary hearing, do not disclose any history. Claimant also allegedly told a doctor whom he saw on May 27, 2003, for an MRI that he had injured his back at work. But the notes from that doctor presented at the preliminary hearing do not disclose any type of history. On the other hand, claimant presented a June 25, 2003 medical report from Dr. Edward Prostic that states claimant injured his back on May 7, 2003, during the course of his employment as a cook for respondent.

The record is not clear when claimant began working for respondent and the record is inconsistent when his back symptoms allegedly began. Claimant's testimony that he reported his back injury to respondent is contradicted by Mr. Wood. Other witnesses, who testified on respondent's behalf, either indicated they worked with claimant after May 7, 2003, and that they did not notice claimant display pain behavior or they testified claimant did not advise them he had hurt his back while working for respondent. On the other hand, one of those former coworkers testified that claimant stated he did not know how he had injured his back. Another former coworker testified that claimant stated he had injured his

back while moving a couch for his mother. And still another former coworker testified about a May 8 or May 9, 2003 conversation with claimant in which he stated he hurt his back moving heavy rocks in his yard but that his back problems might have been the result of an earlier car wreck. That coworker also testified that during approximately three conversations with claimant during his last week of working for respondent claimant never mentioned hurting his back at work.

Despite claimant's testimony and the medical report from Dr. Prostic, the Board agrees with the Judge that the record fails to establish it is more probably true than not that claimant's back injury arose out of and in the course of employment with respondent. Accordingly, claimant's request for benefits should be denied.

Because of the above findings and conclusions, the notice issue is moot.

**WHEREFORE**, the Board affirms the October 31, 2003 Order entered by Judge Frobish.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2003.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
David W. Rogers, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Anne Haught, Acting Workers Compensation Director